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September 10, 2021

VIA ECF

Honorable Katharine H. Parker, U.S.M.J.
 Daniel Patrick Moynihan United States Courthouse
 500 Pearl Street
 New York, New York 10007

Re: *The Gap, Inc. v. Ponte Gadea New York LLC*
Case 1:20-cv-4541(LTS)(KHP)

Dear Judge Parker:

We serve as counsel to Ponte Gadea New York LLC (“Ponte Gadea”) and submit this letter as directed in Your Honor’s August 10, 2021 Opinion and Order on Damages (the “Damages Order”) [ECF No. 92] outlining a recalculation of damages set forth in the Damages Order.¹ As directed, Ponte Gadea attempted in good faith to meet and confer with Gap on these issues. Yet, despite these efforts, Gap has failed to provide Ponte Gadea with its position regarding damages. Nevertheless, Gap has taken certain actions that tend to resolve most of the damages issues, and Ponte Gadea otherwise submits its position as to the remainder.

Specifically, on August 19, 2021, Ponte Gadea sent Gap an e-mail attempting to meet and confer on the items of damages other than for the Replacement Tenant Period. For Gap’s convenience, this communication included an excel spreadsheet of Ponte Gadea’s position regarding the calculation of the relevant items of damages, which totaled \$7,315,083.10. A copy of the e-mail and spreadsheet is attached as **Exhibit A**, and the latter is reproduced below:

Description	Amount	Invoice Date	Interest Rate	Interest Accrued as of	Accrual Days to 8/10/2021	Interest Per Day	Interest Accrued	Total w/ Interest
April 2020 Fixed Rent	\$ 612,500.00	4/1/2020	5.25%	4/1/2020	497	\$ 88.10	\$ 43,785.36	\$ 656,285.36
April 2020 Additional Rent (CAM)	\$ 5,216.93	4/1/2020	5.25%	5/1/2020	467	\$ 0.75	\$ 350.43	\$ 5,567.36
May 2020 Fixed Rent	\$ 612,500.00	5/1/2020	5.25%	5/1/2020	467	\$ 88.10	\$ 41,142.38	\$ 653,642.38
May 2020 Additional Rent (CAM)	\$ 5,216.93	5/1/2020	5.25%	5/31/2020	437	\$ 0.75	\$ 327.92	\$ 5,544.85
June 1-15, 2020 Fixed Rent	\$ 306,250.00	6/1/2020	5.25%	6/1/2020	436	\$ 44.05	\$ 19,205.65	\$ 325,455.65
June 1-15, 2020 Additional Rent (CAM)	\$ 2,608.47	6/1/2020	5.25%	7/1/2020	406	\$ 0.38	\$ 152.33	\$ 2,760.79
June 16-30, 2020 Holdover - 1.5x Fixed Rent	\$ 459,375.00	6/1/2020	9.00%	6/1/2020	436	\$ 113.27	\$ 49,385.96	\$ 508,760.96
June 16-30, 2020 Holdover - 100% Additional Rent (CAM)	\$ 2,608.47	6/1/2020	9.00%	7/1/2020	406	\$ 0.64	\$ 261.13	\$ 2,869.60
July 1-16, 2020 Holdover - 1.5x Fixed Rent	\$ 444,556.45	7/1/2020	9.00%	7/1/2020	406	\$ 109.62	\$ 44,504.36	\$ 489,060.82
July 2020 Holdover - 100% Additional Rent (CAM)	\$ 5,008.25	7/1/2020	9.00%	7/31/2020	376	\$ 1.23	\$ 464.33	\$ 5,472.58
July 17-31, 2020 Holdover - 2x Fixed Rent	\$ 632,258.06	7/1/2020	9.00%	7/1/2020	406	\$ 155.90	\$ 63,295.10	\$ 695,553.16
August 2020 Holdover - 2x Fixed Rent	\$ 1,225,000.00	8/1/2020	9.00%	8/1/2020	375	\$ 302.05	\$ 113,270.55	\$ 1,338,270.55
August 2020 Holdover - 100% Additional Rent (CAM)	\$ 5,008.25	8/1/2020	9.00%	8/31/2020	345	\$ 1.23	\$ 426.04	\$ 5,434.29
September 2020 Holdover - 2x Fixed Rent	\$ 1,225,000.00	9/1/2020	9.00%	9/1/2020	344	\$ 302.05	\$ 103,906.85	\$ 1,328,906.85
September 2020 Holdover - 100% Additional Rent (CAM)	\$ 5,008.25	9/1/2020	9.00%	10/1/2020	314	\$ 1.23	\$ 387.76	\$ 5,396.01
October 1-14, 2020 Holdover - 2x Fixed Rent	\$ 553,225.81	10/1/2020	9.00%	10/1/2020	314	\$ 136.41	\$ 42,833.32	\$ 596,059.13
October 1-14, 2020 Holdover - 100% Additional Rent (CAM)	\$ 2,261.79	10/1/2020	9.00%	10/31/2020	284	\$ 0.56	\$ 158.39	\$ 2,420.18
Prorated 2nd Half (2020-2021) Real Estate Taxes	\$ 240,427.40	1/27/2021	5.25%	2/26/2021	166	\$ 34.58	\$ 5,740.62	\$ 246,168.02
Tax Auditing Fee	\$ 1,354.79	4/1/2021	5.25%	5/1/2021	102	\$ 0.19	\$ 19.88	\$ 1,374.67

¹ Ponte Gadea is simultaneously submitting a separate letter (as directed in the Damages Order) addressing the rental value of the Premises from October 15, 2020 through January 31, 2021 (the “Replacement Tenant Period”).

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Attorneys' Fees	\$ 455,949.20	8/10/2021	5.25%	8/10/2021	0	\$ 65.58	\$ -	\$ 455,949.20
Disbursements	\$ 259.56	8/10/2021	5.25%	8/10/2021	0	\$ 0.04	\$ -	\$ 259.56
Setoff	\$ (16,128.84)							\$ (16,128.84)
TOTAL	\$ 6,785,464.76						\$ 529,618.34	\$ 7,315,083.10

Counsel for Gap never responded to this e-mail communication with a substantive response regarding any of the categories of damages. *Id.* Instead, without any previous discussion, on August 31, 2021, Ponte Gadea received an automatically generated remittance e-mail from Gap that set forth various invoices and amounts that Gap was paying directly to Ponte Gadea by ACH transfer in the amount of \$6,886,018.92. A copy of this remittance e-mail, along with the details attached thereto, are enclosed as **Composite Exhibit B**. Upon review, the remittance details demonstrated that Gap had issued payment to Ponte Gadea for the majority of the damages awarded in the Damages Order, including all Rental from April 1, 2020 to June 15, 2020, all Holdover from June 16, 2020 to October 14, 2020, all additional rent (CAM) from April 1, 2020 to October 14, 2020, all interest calculated thereon at 5.25% and 9%, respectively, and the unpaid real estate taxes for the period ending January 31, 2021. Below is a summary of the payment and remittance details:

Month	Base Rent	Additional Rent	Interest	Other	Total
Apr-20	612,500.00	5,216.93	45,402.20		663,119.13
May-20	612,500.00	5,216.93	42,736.70		660,453.63
Jun-20	765,625.00	5,216.93	69,543.65		840,385.58
Jul-20	1,076,814.52	5,216.93	112,056.96		1,194,088.41
Aug-20	1,225,000.00	5,216.93	117,999.71		1,348,216.64
Sep-20	1,225,000.00	5,216.93	108,596.14		1,338,813.07
Oct-20	553,225.80	2,356.03	44,933.63		600,515.46
RET				240,427.00	240,427.00
Total	6,070,665.32	33,657.61	541,268.99	240,427.00	6,886,018.92

On September 1, 2021, Ponte Gadea received Gap's payment of \$6,886,018.92. On September 2, 2021, Ponte Gadea received a letter from Matthew Irwin, Gap's Vice President and Deputy General Counsel, that addressed this payment. In that letter, Gap explains that the payment was made "under protest" based on "the content of the [Damages Order] and to stop the accrual of interest" but that Gap reserved all rights available in the "current litigation" and/or "appeal." A copy of Mr. Irwin's letter is attached as **Exhibit C**. Gap's payment has not been separately addressed by Gap's litigation counsel with respect to how it impacts the Damages Order, this submission, or the Court's contemplated final order on damages.

Regardless, with respect to Gap's payment of base rent, additional rent (CAM), and real estate tax, the parties essentially agree on these calculations.² With respect to the interest calculation, Gap calculated and paid a total amount of interest that is \$17,351.29 *greater* than the amount calculated in Ponte Gadea's August 19, 2021 e-mail and chart. While Ponte Gadea is unclear how Gap reached that slightly higher interest calculation, Ponte Gadea submits it is

² Gap's real estate tax payment is \$.40 less than the amount in Ponte Gadea's chart and the Court's Damages Order. [ECF No., p. 8]. It is undisputed that Gap owes the additional \$.40. *Id.*

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against Gap's interest to pay more than is required and thus defers and agrees with Gap's calculation. As such, with respect to the damages set forth in the second chart above summarizing Gap's payment to Ponte Gadea, Ponte Gadea agrees with Gap's calculations.

Excluded from Gap's payment to Ponte Gadea is interest accrued on the unpaid real estate taxes (\$5,740.62), the tax auditing fee and applicable accrued interest (\$1,374.67),³ attorneys' fees awarded through June 4, 2021 (\$455,949.20), disbursements (\$259.56),⁴ and Gap failed to deduct the set-off Ponte Gadea noted in its filings (\$16,128.84).⁵ Together, the amount of damages that remains outstanding to Ponte Gadea pursuant to the Damages Order (other than for the Replacement Tenant Period) is \$447,195.61.

On September 3, 2021, counsel for Ponte Gadea again sought to meet and confer with counsel for Gap as required by the Damages Order, which the parties agreed to hold on September 8, 2021. Copies of the e-mail communications scheduling this meet and confer are attached as **Exhibit D**. On this call,⁶ counsel for Gap indicated that they were unprepared to discuss (much less agree or disagree) with any of the damage calculations set forth in the excel spreadsheet circulated on August 19, 2021 or the rental value for the Tenant Replacement Period. Gap explained during the call that it understood the discussion to be for settlement purposes and to explore resolution of the damages issues without further litigation or submissions by the parties, despite the Court's directive in the Damages Order and Ponte Gadea's reference to that order in its meet and confer requests. Regardless, to date, Ponte Gadea has received no input from Gap as to any of the recalculated damages, other than the remittance information (Exhibit B). Because Gap has not responded to Ponte Gadea's recalculation of damages, Ponte Gadea contends that Gap's silence – and ample opportunity to object – is tantamount to an agreement.

Thus, Ponte Gadea seeks an award of damages for the total amount that remains outstanding (*i.e.*, less Gap's payment) from the Court's Damages Order, which is \$447,195.61 for all damages other than the Replacement Tenant Period, plus \$2,332,660.26 for the Replacement Tenant Period damages (which are addressed in the separate submission filed contemporaneously herewith), plus the attorneys' fees and costs incurred from June 5, 2021 to September 9, 2021 in the total amount of \$64,821.20.⁷ For the same reasons as with the previous fees and costs awarded in the Damages Order, Ponte Gadea is entitled to these fees and costs incurred in connection with these submissions, especially as Gap's failure to respond to Ponte Gadea's damages calculations and fair market rental value analysis forced Ponte Gadea to expend the fees to prepare and file these submissions. Thus, Ponte Gadea is entitled to a grand total of \$2,844,677.07.⁸

³ [ECF No. 92, pp. 8, 22].

⁴ *Id.* p. 30.

⁵ [ECF No. 86, ¶ 17(h)]; [ECF No. 63-9 ¶ 22].

⁶ Participants included counsel for Gap, Michael Geibelson (Robins Kaplan), Joshua Epstein and Zachary Karram (Davis Gilbert), and counsel for Ponte Gadea, the undersigned and Kathleen Prystowsky.

⁷ A declaration of Darryl R. Graham in support of the additional attorneys' fees is attached as **Exhibit E**.

⁸ With respect to Gap's payment of \$6,886,018.92, Ponte Gadea defers to the Court on how to address this issue and whether it should be included in the final judgment. As far as Ponte Gadea's position is concerned, the \$6,886,018.92 has been satisfied, and that payment shall not serve to prejudice Ponte Gadea's rights whatsoever.

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We thank the Court for its attention to this matter.

Respectfully submitted,

/s/ Darryl R. Graham

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